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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

MAILED

Application Number: 10/723,817
Filing Date: November 25, 2003
Appellant(s): SADINSKY, STEVEN E.

AUG 25 2006

Technology Center 2600

Thomas J. Daly
For Appellant

**SUPPLEMENTAL
EXAMINER'S ANSWER**

This supplemental Examiner's Answer is in response to the Return Order of July 7, 2006. The Supplemental Examiner's Answer correctly includes the relied upon references under the section heading (8) Evidence Relied Upon.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

USPN 2,384,338	Rasso	September 4, 1945
USPN 4,576,364	O'Fearna	March 18, 1986
USPN 5,664,769	Sadinsky et al.	September 9, 1997

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 18, 20 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Rasso (US 2,384,338).

As to claim 18, Rasso discloses a pole **6** capable of use with a gate comprising:

a lower end;

an insert **12** that is received within the lower end of the fence pole; and

a pin **11** that is fixedly (welded; column 2 lines 1-10) attached to the insert, the pin having a diameter smaller than that on the pole and a portion that protrudes from the lower end of the fence pole;

wherein the pin is capable of being inserted into a drilled socket in a pool deck (Figure 1).

As to claim 20, Rasso discloses a fence pole **6** capable of use with a gate wherein the pin **11** is made of metal (Figure 1).

Art Unit: 3679

As to claim 25, Rasso discloses a pole **6** capable of use with a gate wherein the pin **11** is fixedly attached to the insert **12** by an adhesive (welded; column 2 lines 1-10).

Claims 18,19 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by O'Fearna (US 4,576,364).

As to claim 18, O'Fearna discloses a pole **12** capable of use with a gate comprising:

a lower end;

an insert **18** that is received within the lower end of the fence pole; and

a pin **16** that is fixed attached (column 2 lines 24-29) to the insert, the pin having a diameter smaller than that on the pole and a portion that protrudes from the lower end of the fence pole;

wherein the pin is capable of being inserted into a drilled socket in a pool deck (Figure 2).

As to claim 19, O'Fearna discloses a pole **12** capable of use with a gate wherein the insert **18** is made of plastic (Figure 2).

As to claim 25, O'Fearna discloses a pole **12** capable of use with a gate wherein the pin **16** is fixedly attached to the insert **18** by an adhesive (column 2 lines 24-29).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over O'Fearna.

As to claim 20, O'Fearna fails to disclose a pole capable of use with a gate wherein the pin is made of metal.

The Appellant is reminded that the selection of a known material based upon its suitability for the intended use is a design consideration within the skill of the art. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a pole as disclosed by O'Fearna to have a pin made of metal as such practice is a design consideration within the skill of the art.

Claims 1-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sadinsky et al. (US 5,664,769) in view of O'Fearna.

As to claims 1 and 24, Sadinsky et al. disclose a lightweight fence and gate for swimming pools surrounded by a deck comprising a plurality of poles **11**; a mesh screen **IF** tensioned between the poles having top and bottom bindings; a gate **G** in the fence including a frame having a pair of spaced upright support members **31,33**, a first horizontal brace **12** for spacing the upright support members and a length of mesh screen tensioned between the upright support members; support means **21,22** capable of withstanding lateral tension forces of the screen for supporting and latching the gate; hinges **H** secured to the support means on one side of the gate; and

a latch device **M** secured to the gate and to the support means on the opposite side of the gate;

wherein the poles (capable of including a pin) are adapted to be inserted into the pool deck adjacent to the pool; and

wherein the pool deck has a plurality of sockets, each socket adapted to receive one pole (capable of receiving a pin; Figures 2, 3 and 5).

Sadinsky et al. fail to disclose a lightweight fence and gate wherein the poles include an insert that is contained within each pole and a pin that is fixedly attached to each insert, the pin protruding from the bottom of each pole; wherein the pin is fixedly attached to the insert by an adhesive.

O'Fearna teaches a lightweight fence comprising a plurality of poles **12**, the poles including an insert **18** that is contained within each pole and a pin **16** that is fixedly attached to each insert, the pin protruding from the bottom of each pole; wherein the pins are capable of being inserted into a pool deck adjacent to a pool; wherein the pin is fixedly attached to the insert by an adhesive (column 2 lines 24-29); the insert and pin providing for easy insertion of the poles into the ground, while providing for safe and easy transport and storage of the poles, the insert and pin being pushed inside the pole during storage (Figure 2, column 1 lines 40-43, column 3 lines 33-36). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a lightweight fence and gate as disclosed by Sadinsky et al. to have an insert and pin as taught by O'Fearna in order to provide for easy insertion of the poles, while providing for safe and easy transport and storage of the poles.

As to claim 2, O'Fearna teaches a lightweight fence wherein an insert **18** is made of plastic (Figure 5, column 2 lines 50-55).

As to claim 3, Sadinsky et al. in view of O'Fearna fails to disclose a lightweight fence and gate wherein the pin is made of metal.

The Appellant is reminded that the selection of a known material based upon its suitability for the intended use is a design consideration within the skill of the art. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a lightweight fence and gate as disclosed by Sadinsky et al. in view of O'Fearna to have a pin made of metal as such practice is a design consideration within the skill of the art.

As to claim 4, Sadinsky et al. disclose a lightweight fence and gate wherein the support means **21,22** includes on each side of the gate **G** a pair of poles **21,22** inserted into the pool deck with cross members **24,25** attached to both of the pair of poles (Figure 3).

As to claim 5, Sadinsky et al. disclose a lightweight fence and gate wherein the gate **G** includes a generally U-shaped frame opening upwardly with the first horizontal brace **13** secured to the lower ends of the upright support members **31,33** and a second horizontal brace **CB** secured to the upright support members on the pool side of the mesh screen **IF** at a height well below the top of the gate fabric (Figure 3).

As to claim 6, O'Fearna teaches a fence and gate wherein an insert **18** is polyvinylchloride (Figure 5, column 2 lines 50-55).

As to claim 7, Sadinsky et al. in view of O'Fearna fails to disclose a lightweight fence and gate wherein the pin is made of stainless steel.

The Appellant is reminded that the selection of a known material based upon its suitability for the intended use is a design consideration within the skill of the art. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a lightweight fence and gate as disclosed by Sadinsky et al. in view of O'Fearna to have a pin made of stainless steel as such practice is a design consideration within the skill of the art.

As to claim 8, Sadinsky et al. disclose a fence and gate wherein the support means **21,22** includes on each side of the gate **G** a pair of poles **21,22**, wherein the poles are inserted into the pool deck and wherein cross members **24,25** are attached to both poles (Figure 3). O'Fearna teaches a fence wherein a pair of poles **12** have a plastic insert **18** contained within each pole and a pin **16** that is attached to each insert, the pin protruding from the bottom of each pole, wherein the pins are inserted into the ground (Figure 2).

Sadinsky et al. in view of O'Fearna fails to disclose a lightweight fence and gate wherein the pin is made of metal.

The Appellant is reminded that the selection of a known material based upon its suitability for the intended use is a design consideration within the skill of the art. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to

Art Unit: 3679

modify a lightweight fence and gate as disclosed by Sadinsky et al. in view of O'Fearna to have a pin made of metal as such practice is a design consideration within the skill of the art.

As to claim 9, O'Fearna teaches a fence wherein a pin **16** is attached to a plastic insert **18** by an adhesive (Figure 2, column 2 lines 24-29).

As to claim 10, Sadinsky et al. disclose a lightweight fence and gate for swimming pools surrounded by a deck comprising a plurality of poles **11**; a first length of mesh screen **IF** tensioned between the poles defining the pool fence;

a gate **G** in the fence including a frame having a pair of spaced upright support members **31,33** and a second length of mesh screen tensioned between the upright support members of the gate; and

support means **21,22** to which the first length of mesh screen is attached for supporting the fence and gate and latching the gate including a truss structure capable of isolating the lateral tension forces of the first length of mesh screen on opposite sides of the gate;

wherein the poles (capable of including a pin) are adapted to be inserted into the deck adjacent to the pool; and

wherein the pool deck has a plurality of sockets, each socket adapted to receive a pole (capable of receiving a pin; Figures 2, 3 and 5).

Sadinsky et al. fail to disclose a lightweight fence and gate wherein the poles include an insert that is contained within each pole and a pin that is attached to each insert, the pin protruding from the bottom of each pole.

O'Fearna teaches a lightweight fence comprising a plurality of poles **12** adapted to be inserted into the ground, the poles including an insert **18** that is contained within each pole and a pin **16** that is attached to each insert, the pin protruding from the bottom of each pole; wherein the pins are capable of being inserted into a deck adjacent to a pool; the insert and pin providing for easy insertion of the poles into the ground, while providing for safe and easy transport and storage of the poles, the insert and pin being pushed inside the pole during storage (Figure 2, column 1 lines 40-43, column 3 lines 33-36). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a lightweight fence and gate as disclosed by Sadinsky et al. to have an insert and pin as taught by O'Fearna in order to provide for easy insertion of the poles, while providing for safe and easy transport and storage of the poles.

As to claim 11, O'Fearna teaches a fence wherein inserts **18** of poles **12** are made of plastic (Figure 5, column 2 lines 50-55).

As to claim 12, Sadinsky et al. in view of O'Fearna fails to disclose a lightweight fence and gate wherein the pin is made of metal.

The Appellant is reminded that the selection of a known material based upon its suitability for the intended use is a design consideration within the skill of the art. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Accordingly, it would have been

Art Unit: 3679

obvious to one having ordinary skill in the art at the time the invention was made to modify a lightweight fence and gate as disclosed by Sadinsky et al. in view of O'Fearna to have a pin made of metal as such practice is a design consideration within the skill of the art.

As to claim 13, O'Fearna discloses a fence and gate wherein pins **16** are attached to inserts **18** by an adhesive (Figure 2, column 2 lines 24-29).

As to claim 14. Sadinsky et al. disclose a method for installing a self closing gate in a tensioned removable swimming pool fence comprising a plurality of poles **11** interconnected by flexible mesh fencing **IF** comprising:

inserting the plurality of poles (capable of including a pin) into a deck surrounding a swimming pool with the flexible mesh fencing in tension to maintain the fence in tension, the deck having drilled sockets adapted to receive the poles (capable of receiving a pin);

the first and last poles of the series of poles defining a gate opening;

the first and last poles each constituting a pair of poles interconnected to each other to define a support structure **21,22** capable of absorbing the tension of the flexible mesh fencing;

fabricating a gate **G** including a pair of side rails **31,33**, a cross rail **12** and flexible mesh tensioned between the side rails;

hinging the first of the pair of side rails of the gate to the first of the pair of poles; and

installing a latch **M** between the second of the pair of side rails of the gate and the last pole of the tensioned fence;

whereby the gate is free to open and close without interference by the tension of the mesh of the fencing (Figures 2, 3 and 5).

Sadinsky et al. fail to disclose a method wherein the poles including an insert that is contained within each pole and a pin that is attached to each insert, the pin protruding from the bottom of each pole.

O'Fearna teaches a method for installing a fence comprising a plurality of poles **12** interconnected by flexible mesh fencing **10**, the poles including an insert **18** that is contained within each pole and a pin **16** that is attached to each insert, the pin protruding from the bottom of each pole; the insert and pin providing for easy insertion of the poles into the ground, while providing for safe and easy transport and storage of the poles, the insert and pin being pushed inside the pole during storage (Figure 2, column 1 lines 40-43, column 3 lines 33-36). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a method as disclosed by Sadinsky et al. to comprise an insert and pin as taught by O'Fearna in order to provide for easy insertion of the poles, while providing for safe and easy transport and storage of the poles.

As to claim 15, O'Fearna teaches a method wherein an insert **18** is made of plastic (Figure 5, column 2 lines 50-55).

As to claim 16, Sadinsky et al. in view of O'Fearna fails to disclose a method wherein the pin is made of metal.

The Appellant is reminded that the selection of a known material based upon its suitability for the intended use is a design consideration within the skill of the art. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a method as disclosed by Sadinsky et al. in view of O'Fearna to have a pin made of metal as such practice is a design consideration within the skill of the art.

As to claim 17, O'Fearna teaches a method wherein a pin **16** is attached to an insert **18** with an adhesive (column 2 lines 24-29).

(10) Response to Argument

As to claim 18, rejected under 35 U.S.C. 102(b) as being anticipated by Rasso, Appellant argues that:

Rasso does not disclose a gate pole *wherein the pin is adapted to be inserted into a drilled socket in a pool deck.*

Examiner disagrees. As to claim 18, Rasso discloses a pole **6** capable of use with a gate, comprising a pin **11**, wherein the pin is capable of being inserted into a drilled socket in a pool deck (Figure 1). Examiner notes that neither a gate nor a drilled socket in a pool deck have been positively claimed in claim 18. Use of the pole with a gate or insertion of the pin in a drilled socket in a pool deck are strictly intended use within the claim and are not positive claimed limitations.

Appellant further argues that Rasso teaches away from the idea of pins being inserted into drilled sockets in a pool deck, and that the poles disclosed by Rasso could not be sturdily inserted into drilled sockets without wobbling and instability. Examiner

Art Unit: 3679

disagrees. Rasso discloses a pole **6** comprising a pin **11** capable of being inserted into any size socket; the pin is capable of being inserted into a socket having any size diameter, inherently, in order for one to determine proper seating within the socket (Figure 1).

Examiner notes that claims 20 and 25 have been grouped with claim 18 and have not been argued separately. Accordingly, no response is warranted in regards to claims 20 and 25.

As to claim 18, rejected under 35 U.S.C. 102(b) as being anticipated by O'Fearna, Appellant argues that:

O'Fearna does not disclose a *gate pole wherein the pin is adapted to be inserted into a drilled socket in a pool deck.*

Examiner disagrees. As to claim 18, O'Fearna discloses a pole **12** capable of use with a gate, comprising a pin **16**, wherein the pin is capable of being inserted into a drilled socket in a pool deck (Figure 2). Examiner notes that neither a gate nor a drilled socket in a pool deck have been positively claimed in claim 18. Use of the pole with a gate or insertion of the pin in a drilled socket in a pool deck are strictly intended use within the claim and are not positively claimed limitations.

Appellant further argues that O'Fearna teaches away from the idea of pins being inserted into drilled sockets in a pool deck, and that the poles disclosed by O'Fearna could not be sturdily inserted into drilled sockets without wobbling and instability. Examiner disagrees. O'Fearna discloses a pole **12** comprising a pin **16** capable of being inserted into any size socket; the pin is capable of being inserted into a socket

having any size diameter, inherently, in order for one to determine proper seating within the socket (Figure 2).

Examiner notes that claims 19 and 25 have been grouped with claim 18 and have not been argued separately. Accordingly, no response is warranted in regards to claims 19 and 25.

As to claim 20, rejected under 35 U.S.C. 103(a) as being unpatentable over O'Fearna, Appellant reiterates that:

O'Fearna does not disclose a *gate pole wherein the pin is adapted to be inserted into a drilled socket in a pool deck*, as previously argued in regards to claim 18.

Examiner notes that Appellant's comments do not constitute arguments, as arguments in regards to the claim limitations of claim 20 have not been presented.

As to claim 1, rejected under 35 U.S.C. 103(a) as being unpatentable over Sadinsky et al. in view of O'Fearna, Appellant argues that:

Sadinsky et al. in view of O'Fearna does not disclose a lightweight fence and gate comprising a plurality of poles including *an insert that is contained within each pole and pin that is fixedly attached to each insert, the pin protruding from the bottom of each pole, wherein the pins are adapted to be inserted into a deck adjacent to a pool; and wherein the pool deck has a plurality of sockets each socket adapted to receive a pin.*

Examiner disagrees. As to claim 1, Sadinsky et al. disclose a lightweight fence and gate comprising a plurality of poles 11; wherein the poles (capable of including a pin) are adapted to be inserted into the pool deck adjacent to the pool; and wherein the

pool deck has a plurality of sockets, each socket adapted to receive one pole (capable of receiving a pin; Figures 2, 3 and 5).

Sadinsky et al. fail to disclose a lightweight fence and gate wherein the poles include an insert that is contained within each pole and a pin that is fixedly attached to each insert, the pin protruding from the bottom of each pole.

O'Fearna teaches a lightweight fence comprising a plurality of poles **12**, the poles including an insert **18** that is contained within each pole and a pin **16** that is fixedly attached (by an adhesive; column 2 lines 24-29) to each insert, the pin protruding from the bottom of each pole; wherein the pins are capable of being inserted into a pool deck adjacent to a pool; the insert and pin providing for easy insertion of the poles into the ground, while providing for safe and easy transport and storage of the poles, the insert and pin being pushed inside the pole during storage (Figure 2, column 1 lines 40-43, column 3 lines 33-36). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a lightweight fence and gate as disclosed by Sadinsky et al. to have an insert and pin as taught by O'Fearna in order to provide for easy insertion of the poles, while providing for safe and easy transport and storage of the poles.

Examiner notes that claim 1 has been interpreted to positively claim the combination of the lightweight fence and gate, and the pool deck having a plurality of sockets, such limitations being positively claimed in the body of the claim.

Appellant further argues that O'Fearna teaches away from the idea of pins being inserted into drilled sockets in a pool deck, and that the poles disclosed by O'Fearna

Art Unit: 3679

could not be sturdily inserted into drilled sockets without wobbling and instability.

Examiner disagrees. O'Fearna discloses a pole **12** comprising a pin **16** capable of being inserted into any size socket; the pin is capable of being inserted into a socket having any size diameter, inherently, in order for one to determine proper seating within the socket (Figure 2).

Examiner notes that claims 10 and 14 have been grouped with claim 1 and have not been argued separately. Accordingly, separate responses in regards to individual claims 1,10 and 14 are not warranted. Further, Examiner notes that claims 2-17 have been grouped with claim 1 and have not been argued separately. Accordingly, no response is warranted in regards to claims 2-17.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Michael P. Ferguson

January 5, 2006



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